Supreme Court, U.S.
FILED
JAN 26 2011
OFFICE OF THE CLERK

No. 10-974

In the

Supreme Court of the United States

BURLINGTON BASKET COMPANY,
Petitioner,

v.

PAMELA S. NEWBERRY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 26, 2011

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QUESTIONS PRESENTED

1. Whether, in light of the Supreme Court's decision in *Gross v. FBL Financial Services*, 129 S.Ct. 2343, 174 L.Ed. 2d 119, (2009), the Court of Appeals was correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework.

2. Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009). by deciding that the use of the term "motivating factor" alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext.

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has concluded that a "motivating factor" jury instruction, even though incorrect under the ADEA, need not be accompanied by a jury instruction on pretext in an ADEA case. Because of a split between the circuits, petitioner submits that this is a decision that it is more appropriate for this Court to make.

LIST OF PARTIES

Pursuant to Rule 14.1(b) the parties to this proceeding have been omitted since all the parties are listed on the cover page.

CORPORATE DISCLOSURE STATEMENT

The Burlington Basket Company is a privately held corporation and there is no public ownership of its corporate stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. INTRODUCTION 2

B. NEWBERRY V. BURLINGTON BASKET COMPANY 3

C. THE JURY INSTRUCTIONS 4

REASONS FOR GRANTING THE WRIT 6

1. The Court of Appeals was not correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework in existence prior to Gross, and then deciding that while the instructions under Gross were incorrect, the jury

instructions "defaulted" into a correct statement of Iowa law. 6

2. Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (2009), by deciding that the use of the term motivating factor alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext. 8

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a jury instruction on pretext is not required in an ADEA case, and this is a decision to be made by this Court, because there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim. 11

A. The First, Seventh, Eighth and Eleventh Circuits have decided that a pretext jury instruction is not required. 11

B. The Second, Third, Fifth and Tenth Circuits have decided that a pretext jury instruction is required. 12

CONCLUSION 14

APPENDIX

Appendix A: Opinion, United State Court of Appeals for the Eighth Court, (September 28, 2010) 1a

Appendix B: Order Denying Motions for Judgment Nov and New Trial and Setting Attorney Fees, In the United States District court for the Southern District of Iowa, Davenport Division, (August 14, 2009) 13a

Appendix C: Judgment in a Civil Case, United States District Court, Southern District of Iowa, (June 18, 2009) 17a

Appendix D: Order Denying Motion for Summary Judgment, In the United States District court for the Southern District of Iowa, Davenport Division, (January 30, 2009) 19a

TABLE OF AUTHORITIES

CASES

Alvarez v. Des Moines Bolt Supply Inc.,
2010WL 4629463 (Nov. 17, 2010) 8

Cabrerea v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994) 12

Conroy v. Abraham Chevrolet-Tampa, Inc.,
375 F.3d 1228 (11th Cir. 2004) 12

DeBoom v. Raining Rose,
772 N.W.2d 1 (Iowa 2009) . . . . . *passim*

Evans v. City of Bishop,
238 F.3d 586 (5th Cir. 2000) 13

Fed Express Corp. v. Holowecki,
552 U.S. ___, 128 S.Ct. 1147, 170 L. Ed. 2d 10 7

Fite v. Digital Equip. Corp.,
252 F.3d 3 (1st Cir. 2000) 11

Gehring v. Case Corp.,
43 F.3d 340 (7th Cir. 1994) 12

Gross v. FBL Fin. Servs.,
129 S.Ct. 2343, 174 L.Ed. 2d 119 (2009) 2, 4, 6, 7

Gross v. FBL Servs. Inc,
588 F.3d 614 (8th Cir. 2009) 8, 9, 10

King v. United States,
553 F.3d 1156 (8th Cir. 2009) 6

Moore v. Robinson Fire Prot. Dist.,
249 F.3d 786 (8th Cir. 2001) 12

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268
(1987) 2

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 120 S.Ct. 2097,
147 L.Ed.2d 105 (2000) 9, 13

Smith v. Borough of Wilkinsburg,
147 F.3d 272 (3d Cir. 1998) 12

Townsend v. Lumbermens Mut. Cas. Co.,
294 F.3d 1232 (10th Cir. 2002) 12, 13

STATUTES

28 U.S.C. 1254(1) 1

Age Discrimination in Employment Act ..... *passim*
29 U.S.C. 623(a) 1, 2

Iowa Civil Rights Act of 1965 ..... *passim*
Iowa Code Sec. 216.6(1)(a)(2003) 1, 7
Iowa Code Sec. 216.6(1)(a)(2010) 8

RULES

Eighth Circuit Manual of Model Civil Jury
Instructions 5.96 2008 7

The Burlington Basket Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eight Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 2010 WL 3746346 and is reproduced in the Appendix herein at 1a.

JURISDICTION

The judgment of the court of appeals was issued on September 28th, 2010. Pet. App. 17a. No rehearing was requested. this Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. Sec. 623(a) provides;

Prohibition of Discrimination.

(a) Employer practices - It shall be unlawful for an employer—
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The Iowa Civil Rights Act of 1965, Iowa Code Sec. 216.6(1)(a)(2003) states:

Unfair employment practices.

It shall be an unfair or discriminatory practice for any:
Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation.

STATEMENT

A. INTRODUCTION

The basis for jurisdiction of the court of the first instance, the district court for the Eighth circuit for the southern district of Iowa, is a federal question based upon 29 U.S.C. 623(a), the Age Discrimination in Employment Act. Petitioner seeks review of the judgment of the Court of Appeals for the Eighth Circuit.

This case is the first of the *Gross v. FBL Financial Services,* 129 S.Ct. 2343, 174 L.Ed. 2d 119, *(2009)* progeny, and the line is not off to a good start. In *Gross*, this Court held that the "mixed motive" analysis adapted from Title VII and *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1987), were not applicable in an ADEA claim. This Court held, among other things, that the burden of persuasion does not shift to the defendant in an ADEA claim. *Gross* at 2349. Moreover, this Court has held that a plaintiff must establish that an

employer took adverse employment action "because of" the age, thereby establishing the "but for" causation of their claim. *Id.*

The Court of Appeals decision in this case creates three questions which necessitate review. The first question is whether the same analytical framework applies to both the ADEA and the Iowa Civil Rights Act in deciding whether Burlington Basket company discriminated against the Pamela Newberry, and thus directly contradicts this Court's decision in *Gross*.

The second question is whether the Appellate Court's decision is in direct contravention of the Iowa Supreme Court decision in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009).

The third question is whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a "motivating factor" jury instruction, even though incorrect under the ADEA, need not be accompanied by a jury instruction on pretext in an ADEA case. This third question is a question that should be decided by this Court, as there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim.

B. NEWBERRY V. BURLINGTON BASKET COMPANY

This case began as a garden-variety age discrimination claim. Newberry worked for Burlington Basket Company, a family owned business, since 1995 until her termination on February 14, 2007. Pet. App. 2a. Newberry worked through a series of different jobs

and her last position was the Company Shipping Coordinator, to which she was promoted in 2004. *Id.* When Burlington Basket began to run into severe financial difficulties, which continue to this day, the Company decided to implement a reduction in force. Pet. App. 3a. Chris Thompson, the Company Controller and son of the CEO recommended that Newberry be terminated, although he did not have decision making authority to do so. *Id.*

Newberry filed suit alleging a violation of the Age Discrimination in Employment Act and the Iowa Civil Rights Act. Pet. App. 3a. At trial in June 2009, Newberry presented no direct evidence of discrimination. Newberry presented evidence that Chris Thompson was biased against older workers and gave preferential treatment to younger employees. *Id.* Burlington Basket alleged that Newberry was the least qualified of the employees eligible for a reduction in force, and Newberry rebutted Burlington Basket Company's evidence with testimony from former supervisors regarding her qualifications and positive evaluations from her personnel file. *Id.* Newberry was allowed to argue to the jury that the Basket Company's basis for termination was a pretext for age discrimination. The jury found in favor of Newberry, awarding her 25, 000.00 for emotional distress and nothing for wages. Pet. App. p. 7a.

C. THE JURY INSTRUCTIONS.

On post trial motions the Burlington Basket moved for JNOV and a new trial arguing that in light of *Gross v. FBL Financial Services,* 129 S.Ct. 2343, 174 L.Ed. 2d 119, (2009), which was decided the same day the jury was given the case, that the jury instruction was

incorrect. Pet. App. 4a. The district court instructed the jury that the plaintiff's age was "a determining factor" if her age "played a part" in Burlington Basket Company's decision to terminate her. The district court denied the post-verdict motions. Pet. App. 4a, 15a.

On appeal, the Eighth circuit court of appeals held that indeed the jury instructions were incorrect under *Gross*. Pet. App. 5a. However, the Appellate Court held that since the district court could formulate jury instructions for state and federal claims under Eighth circuit precedent prior to Gross, the jury instructions under the ADEA, while admittedly deficient, were "virtually identical" to Iowa law, given the Iowa Supreme Court decision in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009). pet. App. 5a-6a. The appellate court determined that since Newberry v. Burlington Basket was not a "mixed motive" case, but rather a "pretext" case, Burlington Basket suffered no prejudice since liability was imposed under the ICRA, even if the instructions were not correct under the ADEA. Pet. App. 5a.

The Appellate Court also upheld the award of attorney's fees in the case, which are not at issue in Burlington Basket Company's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. **The Court of Appeals was not correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework in existence prior to Gross, and then deciding that while the instructions under Gross were incorrect, the jury instructions "defaulted" into a correct statement of Iowa law.**

The Eighth Circuit Court of Appeals held:

> Consistent with our precedent prior to the Supreme Court's decision in Gross, the district court formulated a single set of jury instructions to cover both claims, and made no distinction between federal and state law.

Pet. App. 4a. *citing to, King v. United States*, 553 F.3d 1156, 1160 (n.3) (8th Cir. 2009). Footnote 3 in *King* states: "Because the same analysis applies to age discrimination claims under the ADEA and the ICRA, we do not separately discuss King's claim under the ICRA." *Id.*

At the time of the Appellate Court ruling on September 28, 2010, the Court of Appeals obviously understood the holding by this Court in Gross: the burden of persuasion never shifts in a mixed motive or pretext discrimination claim, and that the Plaintiff's burden under the ADEA is to prove that "but-for" the employee's age the adverse employment decision would not have occurred. *Gross v. FBL Fin. Servs.*, 129 S.Ct. 2343, 2350, 174 L.Ed. 2d 119 (2009).

The analysis under the Iowa Civil Rights Act is far different. As the court of appeals stated: "Although the Iowa General Assembly has not amended the ICRA to change its long-standing "because of" standard to a "motivating factor" standard, we are of course bound to apply the Iowa court's statement of Iowa law in evaluating Newberry's state-law claim." Pet. App. 6a. Moreover, Newberry did not present any jury instructions which reflected a violation of the Iowa Civil Rights Act. Newberry's proposed jury instructions were based upon the Federal ADEA model instructions and a Title VII "motivating factor" instruction (Eighth Circuit Manual of Model Civil Jury Instructions 5.96 2008). Pet. App. 6a.

While the conflict between the Appellate Court decision and that of a state court of last resort is discussed further below, the Plaintiff's ADEA claim, while different from the State law claim, apparently disappears, since the Court decided that there was no prejudice to Burlington Basket Company by having an incorrect instruction under the ADEA. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. *Gross*, 129 S.Ct. 2343 at 2344, citing to *Fed Express Corp. v. Holowecki*, 552 U.S. ___.___ 128 S.Ct. 1147, 1153, 170 L. Ed. 2d 10, 17. The fact that faulty jury instructions under the ADEA appear to satisfy the Iowa Civil Rights Act equates to a jurisprudential dartboard, whereby the Plaintiff manages to hit the mark because of legal mistakes, rather than legal analysis.

The more obvious, and broader issue, is that this Court has held that ADEA claims are determined

under the standards set forth in *Gross*, and warrant a different analysis than Iowa state claims modeled after Title VII. The court of appeals recognized this fact in *Alvarez v. Des Moines Bolt Supply Inc.*, 2010WL 4629463 (Nov. 17, 2010), wherein the appellate court recognized that federal and state discrimination claims may not have the same analysis, *citing DeBoom v. Raining Rose,* 772 N.W.2d 1 (Iowa 2009). *Alvarez*, 2010 WL 4629463, n. 2. (emphasis supplied). The conflict arises wherein the court of appeals followed its own pre-Gross precedent in providing the same analysis of federal and state claims in the present case, but relied upon the difference in federal and state discrimination claims in *Gross v. FBL Servs. Inc*, 588 F.3d 614, (8th Cir. 2009), and again in *Alvarez*.

2. **Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (2009), by deciding that the use of the term motivating factor alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext.**

DeBoom v. Raining Rose, 772 N.W.2d 1 (Iowa 2009) is the reigning pronouncement of age discrimination cases in Iowa. The Iowa Civil Rights Act makes it illegal to discriminate "because of" various factors, including the age of an employee. Iowa Code Sec. 216.6(1)(a)(2010). The Iowa Supreme Court has determined that age discrimination, which is included in the Iowa Civil Rights Act, is subject to the same Title VII analysis as race, sex, gender and disability.

"When interpreting discrimination claims under Iowa Code chapter 216, we turn to federal law, including Title VII of the United States Civil rights Act and the Americans with Disabilities Act." *...citations omitted*, *DeBoom v. Raining Rose*, 772 N.W.2d at 7 (Iowa 2009). *DeBoom* was a pretext case, wherein the Plaintiff alleged circumstantial evidence of pregnancy discrimination leading up to the employee's eventual termination.

One of the primary issues in *DeBoom* was the Iowa district court's failure to instruct the jury on the issue of pretext. *DeBoom* at 9. A pretext instruction, under the Iowa Civil Rights Act, states that a jury may infer intentional discrimination if it disbelieves the employer's asserted reasons for terminating the employee. *Id.* The absence of a pretext instruction constituted reversible error and warranted a new trial for DeBoom. Quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105, 120 (2000), the Iowa Supreme Court held: "[T]hus, we hold a pretext instruction is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

Newberry v. Burlington Basket Company did not contain <u>any</u> jury instruction regarding pretext. If, as the Appellate Court found, the modified Newberry jury instructions were insufficient under *Gross* but satisfied Newberry's Iowa Civil Rights claim under *DeBoom*, then those instructions needed to inform the jury that Newberry's age was a motivating factor in the Basket Company's decision to terminate her if it was proven

by a preponderance of the evidence that its stated reasons for the decision are not the real reason, but are a pretext to hide sex discrimination.

Without a pretext instruction, the instructions in Newberry are in conflict with the Iowa Supreme Court decision in *DeBoom v. Raining Rose*: the court of appeals decided that the instructions were sufficient under the Iowa Civil Rights Act, (Pet. App. 7a) when in fact, without a pretext instruction, under Iowa law a new trial is warranted.

In *Gross v. FBL Financial Services Inc.* 588 F.3d 614 (8th Cir. 2009), the appellate court correctly rejected Plaintiff Gross' argument that a violation of the Iowa Civil Rights Act occurs if the jury believes that age was a "motivating factor" even if the jury finds that the employer would have taken the same adverse action in the absence of an impermissible motive. 588 F.3d at 618. The Appellate Court rejected Plaintiff Gross' argument because it: 1) ignored the mixed motive framework still employed in the Iowa Civil Rights Act; 2) was an interpretation in conflict with the Iowa Supreme Court opinion in *DeBoom v. Raining Rose*; and 3) didn't apply because *DeBoom* was a "pretext case" and not a mixed motive case, wherein the employer presented a non-discriminatory reason for terminating the plaintiff and the plaintiff was given the opportunity to argue that the employer's reason was a pretext for pregnancy discrimination. *Gross*, 588 F.3d at 618-620 (2009). The result in Newberry is precisely the argument advanced by Plaintiff Gross on remand, and which was rejected by the appellate court. Consequently, the appellate court's decision is at odds with its own prior decision in *Gross v. FBL Financial Servs., Inc.* 588 F.3d 614 (2009), as

well as the decision of the Iowa Supreme Court in *DeBoom*.

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a jury instruction on pretext is not required in an ADEA case, and this is a decision to be made by this Court, because there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim.

A. The First, Seventh, Eighth and Eleventh Circuits have decided that a pretext jury instruction is not required.

DeBoom v. Raining Rose held: We find the courts requiring a pretext instruction more convincing. A pretext instruction is necessary because discrimination cases are difficult to prove. *DeBoom* at 10. By holding that the instructions in Newberry were deficient pursuant to *Gross* but sufficient pursuant to *DeBoom*, the federal court has decided that a pretext instruction is not required in the Eighth Circuit post-*Gross*, and this is a question for the Supreme Court based upon the split amongst the several circuits.

The issue is not whether the actual word "pretext" is used, but rather, whether the jury should be told that the Plaintiff must establish that the reason articulated by the employer is not real reason for the adverse action.

In *Fite v. Digital Equipment Corp.*, 252 F.3d 3, 7 (1st Cir. 2000), the court held that a jury instruction on

pretext, while permitted, would not be compulsory. The Eighth circuit has expressed doubts as to whether it would ever be reversible error on a failure to give a pretext instruction. *Moore v. Robinson Fire Prot. Dist.*, 249 F.3d 786, 790 n. 9 (8th Cir. 2001). The Seventh Circuit, critical of instructions using words such as pretext, held in *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) that such use is not required. The Eleventh Circuit, equally critical of the use of such an instruction, does not find the absence of the term pretext to be reversible error. *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233-34 (11th Cir. 2004).

B. The Second, Third, Fifth and Tenth Circuits have decided that a pretext jury instruction is required.

The Second circuit in *Cabrerea v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), held that a jury must be told that if they find the elements of the prima facie case, they may disbelieve the defendant's explanation for the adverse action taken (in this case, housing discrimination). *Id.* at 382. The court of appeals for the Second circuit, while critical of legalistic language, recognized that the jury must be instructed that the burden of persuasion stays with the plaintiff in proving that the reason for the employer's adverse action is a pretext for discrimination.

Likewise, *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998) and *Townsend v. Lumbermens Mut. Cas. Co.* 294 F.3d 1232, 1241 (10th Cir. 2002) both ascribe to the view that ..."[I]n cases such as this, a court must instruct jurors that if they disbelieve an employer's proffered explanation they

may-but need not-infer that the employer's true motive was discriminatory." *Id.* In following this court's decision in *Reeves v. Sanderson Plumbing Prods.*, the Fifth circuit has also held that the trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000).

The question of whether or not the trier of fact must be instructed on pretext is a critical one. As the courts continue to struggle with Gross and "but-for" causation, both plaintiffs and defendants will seek to request (or to avoid) a pretext instruction based upon the particular facts of each claim. In this instance, Burlington Basket argues that if the motivating factor instruction was used in a pretext case (as it was decided under the ICRA) then it was up to the trier of fact to determine whether Newberry's termination was pretext or not. Now that it is unquestioned that under *Gross* the plaintiff always retains the burden of persuasion, it is necessary that the question of whether a pretext instruction is required should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, United State Court of Appeals for the Eighth Court, (September 28, 2010) 1a

Appendix B: Order Denying Motions for Judgment Nov and New Trial and Setting Attorney Fees, In the United States District court for the Southern District of Iowa, Davenport Division, (August 14, 2009) 13a

Appendix C: Judgment in a Civil Case, United States District Court, Southern District of Iowa, (June 18, 2009) 17a

Appendix D: Order Denying Motion for Summary Judgment, In the United States District court for the Southern District of Iowa, Davenport Division, (January 30, 2009) 19a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3082

[Filed September 28, 2010]

Pamela Newberry,	)
	)
Appellee,	)
	)
v.	)
	)
Burlington Basket Company,	)
	)
Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: June 17, 2010
Filed: September 28, 2010

Before WOLLMAN, EBEL,[1] and COLLOTON, Circuit Judges.

[1] The Honorable David M. Ebel, Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

COLLOTON, Circuit Judge.

Burlington Basket Company ("Burlington Basket") appeals a jury verdict in favor of Pamela Newberry, a former employee who alleged that Burlington Basket violated the Age Discrimination in Employment Act ("ADEA") and the Iowa Civil Rights Act ("ICRA") by terminating her employment because of her age. Burlington Basket challenges the final jury instructions adopted by the district court,[2] and the court's award of attorney's fees. Because we conclude that the district court correctly instructed the jury under the ICRA, and did not abuse its discretion in calculating the fee award, we affirm.

I.

Pamela Newberry was born in 1953. She began working at Burlington Basket Company, a family-owned and operated manufacturer of wicker products, in 1995. Newberry was hired to assist the company's Controller, Del Moeller, with credit and collection tasks. She was later promoted to the position of Office Coordinator, and, in 2000, to Office Manager. Newberry became the company's Shipping Coordinator in 2004.

Moeller retired from Burlington Basket in 2005. Christopher Thompson, the twenty-seven year-old son of the company's CEO, was named Controller. In early 2007, Thompson and the other members of the company's Executive Committee (his father and two

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[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

uncles) met to discuss a potential reduction in the work force, apparently in response to the company's financial difficulties. Thompson advocated that Newberry's employment be terminated. On February 14, 2007, Burlington Basket fired Newberry. The company retained three other office workers who were between twenty-two and thirty years of age at the time, even though each had fewer than five years of experience at the company.

Newberry filed suit in February 2008, alleging that Burlington Basket terminated her because of her age, in violation of the ADEA and ICRA. During a four-day jury trial in June 2009, Newberry presented evidence suggesting that Christopher Thompson was biased against older employees, and that he gave preferential treatment to younger workers. Burlington Basket asserted that Newberry was fired, while younger workers were retained, because Newberry was the least qualified. Newberry argued that the company's proffered reason was a pretext for age discrimination. She countered with positive evaluations in her personnel file, and testimony from her long-time supervisor regarding her qualifications. The jury found in favor of Newberry, and awarded her $25,000 in damages for emotional distress.

After the verdict, Burlington Basket moved for judgment as a matter of law and for a new trial. In the new trial motion, the company argued that in light of *Gross v. FBL Financial Servs., Inc.*, 129 S. Ct. 2343 (2009), which was decided the same day the jury reached its verdict, the court incorrectly instructed the jury to find that the plaintiff's age was "a determining factor" in the defendant's decision to terminate her employment if her age "played a part" in that decision.

The district court denied the post-verdict motions. The court also awarded Newberry $140,000 in attorney's fees and $5,332.71 in costs.

II.

We consider first Burlington Basket's objection to the final jury instruction concerning the standard of proof under the ADEA and the ICRA. In her complaint, Newberry alleged violations of both statutes. Consistent with our precedent prior to the Supreme Court's decision in *Gross*, the district court formulated a single set of jury instructions to cover both claims, and made no distinction between federal and state law. *See King v. United States*, 553 F.3d 1156, 1160 n.3 (8th Cir. 2009). Similarly, the jury verdict in favor of Newberry and the judgment entered by the district court did not differentiate between the two claims.

The district court charged the jury that Newberry had the burden to prove that her age was "a determining factor" in Burlington Basket's decision to fire her. The court then advised that Newberry's age constituted "a determining factor" if her age "played a part" in the company's decision to terminate her employment. The court further clarified that Newberry "need not prove that [her] age was the only reason for [Burlington Basket's] decisions, only that age was a determining factor by itself or along with other reasons for its decisions." Burlington Basket contends that this instruction was erroneous in light of the Supreme Court's decision in *Gross*. It does not appear from the record that Burlington Basket objected at trial to the challenged instruction, but Newberry does not assert on appeal that the company's claim was forfeited. We

will proceed as though the objection is preserved, because the preservation issue does not affect the outcome.

The challenged jury instruction was not a correct statement of the law under the ADEA after *Gross*. The ADEA makes it unlawful for an employer to take adverse action against an employee "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added). To establish a disparate-treatment claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 129 S. Ct. at 2350. By requiring only that Newberry establish that her age "played a part" in the company's decision, and that it did so "along with other reasons," the instruction failed to communicate properly the "but-for" causation standard of the ADEA.

The district court evidently drew the "played a part" language from this circuit's model jury instruction that defines a "*motivating* factor" for employment discrimination claims under Title VII. *See* Eighth Circuit Manual of Model Civil Jury Instructions - Instruction 5.96 (2008). While Congress amended Title VII in 1991 "to allow for employer liability when discrimination 'was *a motivating factor* for any employment practice,'" it "did not similarly amend the ADEA." *Gross*, 129 S. Ct. at 2350 n.3 (quoting 42 U.S.C. § 2000e-2(m)). The ADEA provides for liability only when a defendant acts "because of" a plaintiff's age, and the jury instructions thus should not have applied what was in effect the "motivating factor" standard of Title VII.

Burlington Basket suffered no prejudice, however, because the challenged instruction was a correct

statement of the law under the ICRA. The ICRA, like the ADEA, provides for liability when a defendant discharges an employee "because of" age. *See* Iowa Code § 216.6(1)(a). Nonetheless, the Supreme Court of Iowa recently concluded, in a sex-discrimination action tried as a so-called "pretext" case, that an instruction derived from Eighth Circuit Model Civil Jury Instruction 5.96 on "motivating factor" was correct. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009).

The instruction in *DeBoom* stated that a plaintiff satisfied her burden of persuasion by showing that a prohibited factor "played a part" in the adverse employment action, and that the factor "need not have been the only reason" for the employer's action. *Id.* The *DeBoom* instruction is thus virtually identical to that given by the district court in this case. The Supreme Court of Iowa held that the instruction correctly stated the law under the ICRA, and even recommended that the term "motivating factor" be used instead of "determining factor" in future cases. *Id.* at 13-14. The ICRA addresses discrimination based on "sex" and "age" in the same section, Iowa Code § 216.6(1)(a), and we see no reason to believe that the Iowa court would vary from *DeBoom* in an age discrimination case. Although the Iowa General Assembly has not amended the ICRA to change its long-standing "because of" standard to a "motivating factor" standard, we are of course bound to apply the Iowa court's statement of Iowa law in evaluating Newberry's state-law claim.

In *Gross v. FBL Financial Servs., Inc.*, 588 F.3d 614 (8th Cir. 2009), on remand from the Supreme Court, we concluded that *DeBoom* did not alter Iowa law governing the ICRA in a mixed-motive case, where the

employer's decision is the result of multiple factors, legitimate and illegitimate. *Id.* at 618-20. Burlington Basket expressly acknowledges, however, that this action was tried as a "pretext" case, and disavows any desire to convert it to a mixed-motive case. Appellant's Reply Br. 2-3. The issue at trial, therefore, was "whether either illegal or legal motives, but not both, were the true motives behind the decision." *Price Waterhouse v. Cooper*, 490 U.S. 228, 260 (1989) (White, J., concurring in the judgment) (internal quotation omitted). In that scenario, *DeBoom* establishes that the district court's instruction, drawn from the Eighth Circuit "motivating factor" model instruction, was correct under Iowa law.

After finding liability, the jury awarded Newberry damages of $25,000 for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Burlington Basket does not dispute that the jury instruction on damages correctly stated Iowa law, and the Supreme Court of Iowa has interpreted the ICRA to permit the award of compensatory damages for emotional distress in an employment discrimination action "without a showing of physical injury, severe distress, or outrageous conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 526 (Iowa 1990). Accordingly, the jury's award of damages is supported by the finding of liability under the ICRA, and the incorrect statement of the law under the ADEA did not prejudice Burlington Basket.

III.

Burlington Basket also objects to the district court's award of $140,000 in attorney's fees to Newberry. The

ICRA, like the ADEA, permits the district court to award "reasonable attorney fees" to a prevailing plaintiff. *See* Iowa Code § 216.15(8)(a)(8); *see also Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009); *DeBoom*, 772 N.W.2d at 12. Burlington Basket argues that the award here is not reasonable. The company observes that the fee award is greater than the $25,000 in damages awarded by the jury, and contends that the award is excessive in light of the results obtained in this case and awards in similar cases. The company also asserts that the $140,000 figure is the product of duplicative billing by the two attorneys representing Newberry.

Because of the district court's "superior understanding" of the proceedings, and the prudence of "avoiding frequent appellate review" of such "factual matters," the Supreme Court has emphasized in cases arising under federal law that "the district court has discretion in determining the amount of a fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Although we consider here a fee award based on the ICRA, the standard of review is a procedural issue that is likely governed by federal law. *See Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334 (7th Cir. 1994); *Felder v. United States*, 543 F.2d 657, 664 (9th Cir. 1976). In any event, Iowa law also calls for abuse-of-discretion review of fee awards, *Boyle*, 773 N.W.2d at 832, and we will review the district court's award under that deferential standard.

We conclude that the district court's award of $140,000 in attorney's fees, while generous, was not an abuse of discretion. The district court expressly considered the factors relevant to determining a reasonable fee award under Iowa law, and made

findings of fact regarding those factors. *See id.* at 832-833; *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897-98 (Iowa 1990). The court reviewed the detailed itemizations submitted by Newberry's attorneys, and found that they had performed the services they claimed. *See Boyle*, 773 N.W.2d at 832. The court found that none of the services was "excessive or exaggerated." The court examined the hourly rates charged by Newberry's attorneys, and determined that those rates were "not unreasonable in this case," even when compared with the lower hourly rates charged by Burlington Basket's attorneys. The court then used the itemizations indicating the hours reasonably expended by Newberry's attorneys together with their hourly billing rates to calculate an appropriate "lodestar" amount. *See Boyle*, 773 N.W.2d at 832; *Dutcher v. Randall Foods*, 546 N.W.2d 889, 896-97 (Iowa 1996). The court thus used an appropriate methodology and considered the relevant factors.

The court specifically addressed the issue of duplicative fees, finding that Newberry's two attorneys performed "some work that overlapped the other" and listed "several duplicate items" in their fee statements. On that basis, the court reduced Newberry's requested fee award by $13,465 to account for the duplication it identified. While another adjudicator might reasonably have reduced the fees further, the district court's decision was within the permissible range of discretion.

The district court also recognized that the damages found by the jury were "modest" and "less than plaintiff had sought," but awarded attorney's fees in an amount greater than the damages. This was

permissible under the ICRA, which does not require exact proportionality between a verdict and attorney's fees. *See Lynch v. City of Des Moines*, 464 N.W.2d 236, 238-39 (Iowa 1990). The district court based its fee award on reasonable grounds after an appropriate review of the relevant documentation from the parties. We cannot say that the court abused its discretion.

* * *

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3082

[Filed September 28, 2010]

Pamela S. Newberry,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
Burlington Basket Company,	)
	)
Defendant - Appellant	)
	)

Appeal from U.S. District Court
for the Southern District of Iowa - Davenport
(3:08-cv-00017-CRW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 28, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

Civil No. 3-08-cv-17

[Filed August 14, 2009]

PAMELA S. NEWBERRY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BURLINGTON BASKET COMPANY,	)
	)
Defendant.	)
	)

ORDER DENYING MOTIONS FOR JUDGMENT NOV and NEW TRIAL and SETTING ATTORNEY FEES

On August 4, 2009, the court held a hearing, received arguments of counsel, and deemed submitted for ruling defendant's amended motion for judgment as a matter of law and alternative motion for new trial, as well as plaintiff's motion and supplemental motion for attorney fees and costs. A jury trial held on June 14 through 18, 2009, had resulted in special verdicts for Newberry and against Burlington Basket Company

(BBC), finding that Newberry's age was a determining factor in BBC's decision to terminate her employment, failure to transfer or consider her for other office jobs; and that Newberry sustained damages of $25,000 for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, but no lost wages. The jury found the BBC age discrimination conduct was "willful," but that did not enhance the verdict amount, because the jury found plaintiff lost no wages as a result of the wrongful termination.

The court had denied BBC's earlier motion for summary judgment, rejecting many of the grounds BBC urged during trial and now again in seeking judgment as a matter of law. The evidence during trial was not significantly different than the documentary evidence presented in summary judgment proceedings. The court dismisses BBC's post-verdict motions and decides Newberry's attorney fees, fixing a reasonable amount.

I. Motion for Judgment NOV. BBC contends the evidence was insufficient to support a factual basis for the jury's verdicts. Newberry's brief in resistance adequately rebuts each of the four factual bases for BBC's motion. Viewing the evidence in the light most favorable to Newberry and the verdicts, the court upholds the verdicts.

The jury could properly find Newberry's age, not the reduction in force, was a determinative factor in her being replaced with a younger person with less seniority, and that Newberry was qualified to perform the position that remained after the force reduction. The jury could properly find Newberry did not have to ask specifically to be transferred to the revised,

consolidated position, because BBC knew she was qualified and would have accepted the revised job. The evidence was sufficient to prove Newberry was willfully terminated because of her age, and indeed would not have been let go but for her age. The verdict will stand as a basis for judgment in her favor for $25,000, costs, and attorney fees.[1]

II. Motion for New Trial. The court's instructions were not flawed in the several respects raised in BBC's exceptions during trial and again in her new trial motion. To the extent Gross v. FBL Financial Serv., Inc., 129 S.Ct. 2343 (2009) clarified with somewhat different wording the test for proving causation in age-based discrimination cases, that decision was not decided until trial was nearly ended and was not cited to the court until post-verdict motions. The court believes the verdict would not have been different had the Gross wording been used in the causation instruction and the verdict form. Finally, the evidence about Christopher Thompson's so-called "stray remarks" was properly received over objection. Though initially ruled inadmissible before trial, the evidence at trial supported admissibility, demonstrating BBC had given Thompson considerable decision-making authority from the beginning of his employment as a BBC family member and that he had participated in the final decision not to keep Newberry as an employee.

III. Attorney fees. The court has applied to Newberry's attorney fees claim the several pertinent

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[1] The court will grant reasonable attorney fees pursuant to 29 U.S.C. section 216 (b)

factors set forth in cases from the Court, such as Hensley v. Eckerhart, 461 U.S. 424, 430 n. 3 (1983), and cases decided in this Eighth Circuit. No two cases are alike, but several of the twelve factors quoted in Hensley are helpful here. The court believes Newberry's two attorneys did perform all the professional services they claim, as identified adequately in their two detailed itemizations. This information was very useful in calculating the "lodestar" amount. The court finds the hourly charges of about $250 and $200 per hour for the two lawyers, though higher than the hourly rates charged by BBC's attorney, were not unreasonable in this case. Each of Newberry's attorneys did some work that overlapped the other, and they listed several duplicate items. None of their services was excessive or exaggerated. In general, the triable issues were not especially novel or difficult. No unusual skills were needed to obtain the modest damages amount, a result less than plaintiff had sought. Considering all of the Hensley factors, and the pertinent arguments in the parties' extensive briefs and attachments, the court concludes Newberry is entitled to attorney fees in the amount of $140,000 for all services to date and payment of the entire Bills of Costs in the sum of $5,332.71.

IT IS SO ORDERED.

Dated this 14th day of August, 2009.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CASE NUMBER: 3:08-CV-00017

[Filed June 18, 2009]

PAMELA S. NEWBERRY,

Plaintiff

v

BURLINGTON BASKET COMPANY,

Defendant

JUDGMENT IN A CIVIL CASE

◉JURY VERDICT . This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

○DECISION BY COURT. This action came to before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

That Plaintiff shall have judgment for damages in the sum of $25,000 from Defendant. In addition, the Plaintiff shall receive costs and attorney fees and such other relief as may be awarded following hearing on August 4, 2009, at 3:00 pm.

Date: June 18, 2009

CLERK, U.S. DISTRICT COURT

/s/ Deborah M. Hanghian
By: Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

Civil No. 3-08-cv-17

[Filed January 30, 2009]

PAMELA S. NEWBERRY,

Plaintiff,

vs.

BURLINGTON BASKET COMPANY,

Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

On January 9, 2009, the court received arguments of counsel by telephone conference call on the motion for summary judgment filed by defendant Burlington Basket Company (BBC) in plaintiff Pamela Newberry's (Newberry) age discrimination lawsuit. Although BBC would prevail if genuine fact issues were decided in its favor, Newberry would likewise prevail if the jury resolves the fact issues in her favor. The court therefore denies BBC's motion for summary judgment.

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed. R. Civ. P. 56, see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Once the movant has demonstrated that no genuine factual dispute stands in the way of a judgment entry, the burden shifts to the resisting party to present specific admissible evidence showing a genuine dispute on the issue, precluding judgment. City of Mount Pleasant v. Associated Elec. Coop., 838 F.2d. 268, 271-72 (8th Cir. 1988).

The parties do not dispute the following facts. Defendant BBC is an Iowa corporation with its principal place of business in Burlington, Iowa. BBC manufactures and imports wicker and plastic products. In 1995, Newberry began her employment with BBC in its Credit and Collections Department. She became Office Coordinator in 1999; in 2000 she began working as Office Manager. In 2000, Wal-Mart was BBC's largest customer, accounting for over 55% of its revenue. In November of 2000 Wal-Mart informed BBC that it was consolidating products. Wal-Mart discontinued its company-wide account with BBC, allowing individual stores to order directly from BBC. In 2001, BBC's sales to Wal-Mart dropped by 46%. In 2002, BBC's sales to Wal-Mart dropped by 36%. From 2000 to 2007 BBC's overall sales dropped by 50 %. BBC reduced the number of its employees, froze cost of living increases for some employees, reduced the salaries of three executives, and began eliminating manufacturing capacity and fixed

overhead expenses. When BBC eliminated plaintiff's Office Manager position in 2003,Newberry transferred to the Shipping Department, where she worked in the middle management position of Shipping Coordinator. At the end of 2006, there were two other middle managers: Electronic Data Interchange Manager Teresa Klein and Systems Manager Jason Thompson. BBC terminated plaintiff's employment on February 14, 2007, when she was fifty-three years old. Of the three middle managers, BBC retained only Teresa Klein. Klein is nine years younger than Newberry. BBC subsequently hired forty-six-year-old Diane Hall.

Defendant contends it is entitled to the entry of summary judgment in its favor because plaintiff's lay-off was the result of a bona fide RIF (reduction in force) and not because of her age.

Newberry has generated fact questions concerning BBC's motivation for terminating Newberry's employment and whether age was a motivating factor in the decision. Questions remaining for trial include but are not limited to whether a BBC decision-maker or decision-makers made an age-related comment or comments concerning her, what duties were performed by the new-hire Hall, and whether BBC policy required it to offer to Newberry the position ultimately filled by Hall.

The court denies BBC's motion for summary judgment and refers this case to Magistrate Judge Ross Walters to determine whether a settlement conference should be scheduled and, if so, to schedule a settlement conference.

IT IS SO ORDERED.

Dated this 30th day of January, 2009.

/s/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT